THE RIGHT TO LOCAL SELF-GOVERNMENT.

III.

THE supremacy of the town in Rhode Island is also evidenced by the insignificant rôle the county has always filled in this state.

The first division into counties was in 1703.

"Be it further enacted by the authority aforesaid: That there shall be two inferior Courts of Common Pleas to be holden on the main land for her majesty, early in the county known by the name of Providence Plantations; and that it shall be held at Providence first as the shire town; and next at the town of Warwick." [1]

"Be it further enacted by the authority aforesaid: That Rhode Island, with the rest of the islands within the said Collony, shall be a county by the name of Rhode Island County; and that Newport be the shire town." [2]

It will be noticed that here there was no incorporation of the counties — they were merely geographical divisions of the colony. Washington County, originally called the Narragansett country, was created next, in 1729, as King's County.[3] The act is entitled "An act for the dividing the colony of Rhode Island and Providence Plantations into three counties . . ." (Newport, Providence, and King's County), and was passed because "the more remote inhabitants are put to great trouble and difficulty in prosecuting their affairs in the common course of justice, as the courts are now established," and this is the only end achieved even now by the division of the state into counties. The name of this county was changed to Washington County in 1781.

The next county created was Bristol County, in 1747,[4] and the fifth and last county was Kent County in 1750.[5]

But although we speak of these counties as incorporated (it is noteworthy that not all of these acts do so), they are not corporations in the sense that towns are corporations; for in Rhode Island everything is done by the towns and nothing by the counties.

There are no county commissioners, no county records, no county

[1] 3 R. I. Col. Recs. 477 (1703). [2] Ib. 478 (1703). [3] 4 R. I. Col. Recs. 427.
[4] 5 R. I. Col. Rec. 208. [5] Ib. 302.

taxes, no county roads, no county probate courts, in Rhode Island. All these things are and ever have been managed by the towns. The only county officers are the clerk of the Supreme Court and Court of Common Pleas, who has the custody of the papers of these courts when they meet in the different counties; the sheriff of the county, whose writ, however, runs throughout the state; and the keeper of the county jail, who, in other than Providence County, is the sheriff of the county. A county can neither sue nor be sued in Rhode Island, as a town can, and is not a corporation.

The power of the town over its own probate matters is another mark of the supremacy of the town in Rhode Island and of the continued retention of an original power. Until the acceptance of the charter, in 1647, each town had jurisdiction over probate matters arising in the town, as it had over all other judicial matters.

In "that remarkable piece of colonial legislation, the code of 1647,"[1] passed at the first meeting of the general assembly, we find[2] a statute concerning the probate of wills, conferring this power upon "the head officer of the Towne," whom we should now call the president of the town council, and who was the chief executive of each town.

In 1675 it was

"Voted, whereas by law of this collony (in the letters thereof in the said law) bearing date in the yeare 1647, said saith the probate of wills, was to be before the head officer, which said name (in the said law) by the present constitutions is extinct, and by reason of difference of opinion probation of wills is deferred; and for that the thinge is as weighty as to make a will for the dead, dyinge without a will, and the said supposed head officer may be in his own case; therefore be it enacted, that the power of probation of wills shall be in the Towne Councills or major part of each, to which it doth belong."

This law plainly recognizes and restores a former custom, and as thus established it has continued to be the law even until now, special town or city probate courts being instituted by the general assembly only as increase of population requires. A right of appeal from these probate courts to the Supreme Court has always existed and is still a part of the judicial system of this state.

There is no escheat to the state in Rhode Island if one dies leaving no heirs. Ch. 217 Gen. Laws of R. I. provides that if a person die leaving real or personal estate without leaving any

[1] Gleanings from the Judicial History of Rhode Island, by Judge Durfee, 6.
[2] 1 R. I. Col. Recs. 188. [3] 2 R. I. Col. Recs. 525.

known heir or personal representative to claim either, the town council of the town in which such real or personal estate shall be may direct the town treasurer to take such estate into his possession for the use of such town until the heir or other legal representative shall call for it. Upon evidence shown, the town treasurer shall account with the claimant for such real or personal estate, but not for any interest or income received therefrom. It is to be remembered that in Rhode Island the word *town* in the statutes includes *city*, unless it is otherwise specified, which in itself is interesting evidence to the effect that there is no essential difference between a town and a city in this state.

The statute in question may be traced back to 1768, and even then it was not anything new. The statute then passed but recognized what had ever been the custom in Rhode Island. It was only declaratory of the law as it had always been in this state.

Another mark of the supremacy of the town in Rhode Island is found in the fact that each town continued to admit freemen of the town after union under the first charter all through its life, after acceptance of the second charter, until a late day. Even the first charter of the city of Providence (1832) continues this old order of things, providing in sec. 10 that the Board of Aldermen and Common Council in joint meeting may admit freemen of the city. The term "freemen of the colony," in the sense of freemen of the united colony, is believed to have been first used in an act of the general assembly in 1665,[1] declaring that those who take the prescribed engagement to his Majesty the King to bear due obedience unto the laws established from time to time in this jurisdiction by the general assembly shall be admitted freemen *of the colony*. It was also ordered "that the foresaid engagement shall be administered to all that are alredy admitted freemen within this jurisdiction, either now, in this Assembly, or in a towne meeting of each of the respective townes of this Collony."

"It was the practice to admit as freemen those whose names were sent in for that purpose by the clerks of the respective towns as well as those who personally appeared before the Assembly, being duly qualified."[2]

In 1670 the general assembly passed an act that each town shall make freemen of the town such as they shall judge capable to do public service in bearing office therein, whether such persons desire it or not.[3]

[1] 2 Col. Recs. 112. [2] 1 Arnold, Hist. R. I. 327. [3] 2 Col. Recs. 357.

"It was the custom to organize (the general assembly) on the day previous to the election, in order to admit freemen. Those who had been received as freemen of the towns were, on these occasions, made freemen of the colony." [1]

That is to say, one might be a freeman of the town or of the colony or of both. This furnishes us with still another striking illustration of the retention of original power by each town long after the united colony was formed.

It was not until 1723 [2] that the general assembly passed an act requiring a freehold qualification (of the value of one hundred pounds, or an annual income of two pounds derived from real estate) to entitle a man to become a freeman. The same year, 1723–24,[3] an act was passed restoring the former power of freemen of the towns who were not freemen of the colony to vote for deputies.

There might be citizens of a town, citizens of the colony or state, and now, under the Fourteenth Amendment to the Constitution of the United States, there may be citizens of the United States. The importance of this recognition of the citizenship, not of a state, but of the United States, has not yet been sufficiently recognized.

The first conception of public peace was that of local peace; after that, the conception of the king's peace, or the peace of the state, was adopted. It was not until 1889 that the legal conception of the peace of the United States was adopted by the Supreme Court of the United States.[4]

And now, in consequence of the Hague Conference of 1899 and its action, we are developing, for the first time, the conception of the peace of the world.

The life of the towns of Rhode Island has been continuous and uninterrupted since their respective settlements, that of Providence being in 1636; of Portsmouth, 1637; of Newport, 1638; and of Warwick, 1642–43. This cannot be said of the colony and state. In 1651 William Coddington, an uneasy and ambitious spirit, — the first judge in Portsmouth, 1638 to 1639, the first judge in Newport, 1639 to 1640, and the first governor under the union of these two colonies, from 1640 to 1647, — went to England, and, by means now impossible to discover, obtained from the council of state a commission to govern the islands of Rhode Island and Conanicut

[1] 1 Arnold, Hist. R. I. 453.

[2] 3 Col. Recs. 338; P. L. R. I. 131; 2 Arnold, 77.

[3] 3 Col. Recs.; 2 Arnold, 78.

[4] *In re* Neagle, petitioner, 135 U. S. 1.

during his life, with a council of six men to be named by the people and approved by himself. It made him the autocrat of the fairest and wealthiest portion of the colony, and put an end to the united colony for the time being. The alarm was great, and John Clark was appointed the agent of the island towns, Portsmouth and Newport, to procure a repeal of Coddington's commission; and Roger Williams was appointed the agent of the mainland towns, Providence and Warwick, to obtain a confirmation of the charter of 1643.

"In effect the same result was aimed at and secured, — a return to their former mode of government by a reunion under the charter."[1]

They succeeded in their mission, and upon receipt of intelligence of the repeal of Coddington's power a town-meeting was held in Providence, February 20, 1652–53, at which, in accordance with a request from the town of Warwick, a meeting of commissioners of the two towns was agreed upon. It was held at Pawtuxet the following week. They drafted a reply to a letter from the island towns of Portsmouth and Newport relating to a reunion of the colony, and appointed two members from each town to carry it and to consult with those of the island concerning the peace and welfare of the state.[2] But their labor was fruitless. The mainland towns contended they were the Providence Plantations, their charter never having been vacated and their government having continued uninterrupted by the defection of the island towns, and therefore the general assembly should meet with them. The island towns claimed the assembly should meet there because they formed the greater part of the colony, and hence had a larger interest in the matter.

The result was that two distinct general assemblies convened at the same time in 1653 and elected different general officers for the colony. So great was the feeling that the assembly at Providence disfranchised those who owned the validity of commissions to fight against the Dutch, issued by the other assembly. The dissension continued, and Sir Henry Vane wrote to the people of Rhode Island a most kind and imploring letter, urging them to reconcile their feuds, for the honor of God and the good of their fellow men.

"Are there no wise men among you? No public self-denying spirits," he asks, . . . "who can find some way or means of union . . . before you become a prey to enemies?" The interest that

[1] 1 Arnold, 239.

[2] 1 R. I. Col. Recs. 239.

Vane took in this matter was due to his intimacy with Williams, and because mainly through his friendly intervention the parliamentary charter was obtained.[1]

At length a reunion was effected in 1654 by articles of agreement signed by a court or general assembly of six commissioners from each of the four towns, assembled at Warwick.

The administration or usurpation of Andors lasted two years and four months, from December, 1686, to April, 1689, during which time all the charter governments of New England were suspended.

Arnold[2] says: —

"The American system of town governments which necessity had compelled Rhode Island to initiate, fifty years before, now became the means of preserving the liberty of the individual citizen when that of the state or colony was crushed. To provide for this was the last act of the expiring legislature. For this purpose it was declared 'lawful for the freemen of each town in this colony to meet together and appoint five, or more or fewer, days in the year for their assembling together, as the freemen of each town shall conclude to be convenient, for the managing the affairs of their respective towns, and that yearly, upon one of those days, town officers should be chosen as heretofore, taxes levied, and other business transacted at such meetings, as the majority should determine."[3]

It was the towns, with their continuous existence, that kept alive the vital flame and rescued it from the embers of the dying colony, after three years of suspension of colonial corporate existence.

We are in a better position now to call more particular attention to the analogy between the system of towns forming Rhode Island and the system of states forming the United States. This analogy is most remarkable. As the original thirteen states constituted the Union of the United States, so did the four original colonies or towns constitute the united colony, subsequently the state. As new states came into the Union upon the same footing as the old states, so new towns became a part of Rhode Island upon the same footing as the old towns. Out of the union of the towns arose the colony, subsequently the state, that afterwards admitted or created new towns. Out of the union of the states arose the United States, that, in its turn, created or admitted new states into the Union. Each town of this state and each state of the United States is supreme in its own sphere, each regulating and administering its

[1] Diman, Orations and Essays, 133.

[2] Vol. 1, p. 487.

[3] 3 R. I. Col. Recs. 191.

own internal affairs, thus constituting a hierarchy consisting of: 1, the town; 2, the state; 3, the United States. When a new state was admitted into the Union, its right to local self-government was reserved, as the thirteen original states had reserved it before them. So, when new towns were formed in Rhode Island, they became a part of the state upon the same footing with the four original towns, that is to say, they retained the right to local self-government by implication, since no distinction was made between the power of the original towns and of the new towns. So no distinction is made, once inside the Union, between an original state and a new state.

"The similarity between the New England confederacy of 1643 and the National Confederation of 1783 has been often remarked; but there is yet a stronger resemblance in the relative position of the four towns of Rhode Island in 1647 and the states of the Federal Union under the constitution of 1787." [1]

The admission of new towns to the union, with like powers as if they were original towns, still further marks this analogy: —

"This colony has, in fact, been a sort of microcosm, in which there have been developed, on a smaller scale, the more important issues which have operated in a large way on the stage of national government." [2]

In an address by George Bancroft, the historian, before the New York Historical Society, in 1866, he said: "More ideas which have since become national have emanated from the little colony of Rhode Island than from any other."

This power of the towns of this state to local self-government can no more be taken from the new towns than from the old towns; for all, once inside the united colony, or state, are on the same footing, just as all the states in the Union, new and old, are on the same footing. The existence of towns with powers of self-government was an admitted underlying fact when the parliamentary charter of 1643 and the royal charter of 1663 were granted, and there arose an unwritten constitution, through the continuous and uninterrupted usage of two hundred years, a part of which is the right of the towns in Rhode Island to administer their own local affairs.[3] The extent and variety of these powers of self-

[1] 1 Arnold, 211, note. [2] Foster, Town Government in Rhode Island, 35.

[3] The constitution adopted in 1843, Art. V. Sec. 1, and Art. VI. Sec. 1, explicitly recognizes the existence of towns and of the city of Providence, then the only city in the state, and constitutes them the political units of the state. But this was nothing new. It was merely declaratory of what had always been the law and the custom in this

control by the towns of this state far exceeded those of the towns of any other state, and, unrecognized by jurists, they continue in force at the present day in something like their pristine vigor. Two reasons have contributed largely to long-continued ignorance of these powers, not only in Rhode Island, but similarly in other states throughout New England, New York, Pennsylvania, and other of the original states. In the first place, the success of the Revolution exalted the power of the states, causing forgetfulness of the fact that the towns contributed as much as the states to our success. But for Samuel Adams and the organized exertion by him and others of the powers of the towns throughout New England, the Revolution would have lost one of its most powerful supports. In the next place, the absence of printed records of the doings of the founders of our towns and colonies until a late day has prevented the growth of a body of lawyers trained in the constitutional law of their respective states. Only a few mousing antiquaries have known anything about these matters until within the last generation. Consequently there has not been any educated public opinion, even among those competent to pass upon such subjects, until lately, that could keep alive a knowledge of these principles and prevent encroachment upon them. Law after law by legislature after legislature in state after state has little by little restricted town powers in a way that cannot be defended. But the printing of the colonial records, even in their present imperfect shape, has made it possible for the lawyers of the present day to know much more about the development of the constitutional law in Rhode Island and in other states than the generations before us could possibly know.

Although the general assembly has undoubted power to pass general laws affecting all towns and cities alike, or upon the request of any one town or city, to give it additional power; although it may mould and direct by general laws all towns and cities, or even any one of them, upon request or necessity, — it is submitted that in Rhode Island towns are the recognized units of its political system; cities are but towns in which the increased population has rendered impracticable the control and regulation of local affairs by town-meetings and town councils, and the inhabitants have therefore petitioned the general assembly to place such control in a city council: a city in Rhode Island is but a town that

state. It is submitted that had the written constitution been silent on this subject, as a part of the unwritten constitution of the state, the same rights of towns would have continued to be the law.

has asked for and submitted to a city organization; it is a political unit in which the control theretofore exercised by town-meetings has now, at their own request, become vested in a city council, with a mayor as the executive head.

If it has become desirable to change a town into a city, to change town boundaries or to divide a town to make two towns, the power thus to mould and direct has been exercised by the general assembly, but only upon the request of the parties in interest, and subject to their assent.

In England the civil divisions into counties, hundreds, tithings, and towns date as far back as Alfred the Great. They were substantially in existence before the Norman conquest. The Anglo-Saxon race carried with it everywhere their Teutonic institutions, their system of local self-government. "It is here they have acquired the habits of subordination and obedience to the laws, of patient endurance, resolute purpose, and the knowledge of civil government which distinguish them from every other government." [1] "The townsfolk themselves assessed their taxes, levied them in their own way, and paid them through their own officers. They claimed broad rights of justice, whether by ancient custom or royal grant; criminals were brought before the mayor's court, and the town prison, with irons and its cage, testified to an authority which ended only with death." [2]

But in England, as well as in the United States, there was a falling off from their former high estate. There, as here, there was no printed record of their ancient procedure and authority, no trained body of lawyers versed in the constitutional law of town rights. "Four hundred years later, the very remembrance of their free and vigorous life was utterly blotted out. When commissioners were sent in 1835 to inquire into the position of the English boroughs, there was not one community where the ancient traditions still lived." [3]

In 1813 the general assembly passed an act the title of which was significant: —

"An Act to enlarge and explain the powers of the Town meetings and Town-Council of the Town of Providence." [4]

This title shows clearly that the general assembly did not attempt to *confer* powers upon the town, but simply to *enlarge* and

[1] State *v.* Denny, 118, at p. 458.

[2] Green, Town Life in the Fifteenth Century, 2.

[3] Ib. 5.

[4] Pub. Laws R. I. 173, Oct. 30, 1813.

explain those it already possessed. The legislation was but declaratory of the common law of the state.

It is instructive to note how Providence, the only city in the state when the constitution was adopted, was changed from a town to a city: —

"In April, 1829, the proposition to adopt a city form of government was agreed to by the freemen by a vote of 312 to 222. The General Assembly of the state, in January, 1830, granted a city charter, with a provision that it should again be referred to the freemen, and, unless again adopted by three fifths of the persons voting, should not go into operation. The small majority in favor of it at first undoubtedly led to the introduction of this provision. On the 15th of February the freemen gave in their ballots on the question, 383 for the charter and 345 against it. Probably the town government, having withstood this attack, would have existed some years longer had it not been for 'the riot,' as it is called, in September, 1831." [Here follows an account of this riot, which we omit.] "Believing the whole evil to have arisen from the inefficiency of a town government, at a town meeting holden on the fifth day of October the freemen, without a dissenting voice, resolved that it was expedient to adopt a city form of government. They appointed a committee to draft a charter, consisting of John Whipple, Caleb Williams, William T. Grinnell, Peter Pratt, George Curtis, and Henry P. Franklin. This committee reported on the 12th of the same month. The meeting adjourned then to the 22d, to take opinion of the freemen by ballot on that day, resolving that, if three fifths should vote in its favor, that then the representatives of the town should be instructed to urge the passage of an act of the General Assembly granting the same. On the 22d, 646 freemen voted, 471 for, and 175 against, the change. The representatives of the town, therefore, according to their instructions, presented the subject to the consideration of the Assembly. Under these circumstances, the General Assembly granted the charter, to go into effect on the first Monday in June, 1832, if three fifths of the freemen voting at a town meeting, to be holden on the 22d of November then next, should be in favor of it. On the 22d of November 647 freemen voted on the question, 459 for and 188 against the city charter."[1]

Without citing the charter in full,[2] we call attention to it, and particularly to section 1: —

"*Be it enacted by the General Assembly and by the authority thereof it is enacted*, that the inhabitants of the town of Providence shall continue to be a body politic and corporate by the name of 'The City of Providence,'

[1] Staples, Annals of Providence, 396.

[2] Pub. Laws R. I. 760, Nov. 4, 1831.

and as such shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises, and shall be subject to all the duties and obligations now appertaining to or incumbent upon said town as a municipal corporation or appertaining to or incumbent upon the freemen and town council thereof, may ordain or publish such acts, laws and regulations as shall be needful to the good order of said body politic, and inflict fines and penalties for the breach thereof."

It will be seen from this that Providence, until 1853 the only city in the state, was not *created*, nor even *incorporated*, by the general assembly. It was simply *continued* as a body politic and corporate under another form of government. The town of Providence now became the city of Providence. It parted with no old rights to the general assembly, it acquired no new ones from it. The general assembly, at the request of the town of Providence and its voters, or freemen, to use the Rhode Island term, moulded and directed its name and form so that it became the city of Providence, with the necessary changes from town to city government. The origin of the broad powers in the charter of this city is obvious. They are but continuations and confirmations of the powers, not *conferred* upon the then town in 1813, but, as the act itself states, then "enlarged and explained." The origin of these powers, the fact that the town of Providence had exercised them before the state or even the colony was created, that the charters granted to the four towns immediately upon organization under the parliamentary charter were merely declaratory of the powers theretofore possessed by these four separate colonies, was known to the men who adopted this act in 1831. They did not attempt to confer new powers upon the town of Providence, — they again enlarged, explained, moulded, directed, and confirmed the powers the town already had, and at the request of the town itself they changed the town into a city. Having always had them, having always exercised them, having had them declared when the general assembly gave the town (and the other three towns) their first charters in 1648, having had them again admitted by the general assembly when it "enlarged and explained" them by the Act of 1813, continuing always to exercise them, having, at the request of its voters, changed the form of government from that of a town to that of a city in 1831, to have, exercise, and enjoy all the rights, immunities, powers, privileges, and franchises then appertaining to said town," the general assembly cannot take them away. Among these rights, immunities, privileges, and franchises, always exercised by the towns of this state, is

the appointment and management of the town police by the town itself, or by the town authorities thereunto authorized by the voters of the town.

Changes have been made from time to time in the charter of the city of Providence, generally at the request of the city, or, if made against its assent, then with the disapproval of those familiar with the history of the past.

The charter as it now stands shows the continued existence of the powers that the town had, even before the first charter. And what is here said of the town and city of Providence is equally true of every other town and city in the state. The state thus continued under an unwritten constitution until the existing constitution was framed and adopted in 1842. At this time the charter granted to the city of Providence in 1831 was in full force and effect. The right of the freemen of Providence, and of every town in the state, to manage their own local affairs was admitted and in full operation. The right admitted and in operation was the right to manage their own local affairs in the manner and within the broad limits within which, as we have seen, this right has always been recognized and admitted in this state. This broad right, exercised from the foundation of the four original colonies to the present day, in a broader and ampler way in this state than in any other state in the Union, is not prohibited in the constitution of the state, either expressly or by implication. On the contrary, the constitution says, Art. I. Sec. 23: "The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people." This right to local self-government, in the full and ample manner hitherto exercised in this state, therefore still exists. What is true of the city of Providence is true of all the cities and towns in the state. From the foundation of each town, whether before or after the united colony was formed, down to and at the time of the formation and adoption of the constitution in 1842, ever since and now, each town (and city) elected its own officers, collected its own tax, and spent its own money in the management of its own affairs, in the ample manner and with the full powers above shown. Each town and city was and is a little republic within itself, subject to the general laws of the state. It enacted its own ordinances, and enforced them through its own courts and its own constables. To call these constables by the higher-sounding metropolitan name of police officers gives the state no higher title to the right to appoint them, and to appropriate the money of the town to pay them. (Of course the state

may appoint state constables or police, and pay them; but whence the right to appropriate the money of the town for that purpose?) Each town managed its own health affairs through its own town council acting as a board of health for the town; and each town had its own court of probate, consisting of the members of its own town council. It made and kept up its own highways. It owned its own poor-farm for the support of its own poor. Each town still holds its financial town-meetings, where only those of its own voters, who are qualified to vote in the financial affairs of the town by the possession of property, decide upon the financial affairs of the town, and make specific appropriations for particular purposes, leaving the details only to the town council. All these things and many more ever were and still are done in this way by the towns of Rhode Island. The county, in this state, is a mere geographical term. There are not and never have been any county roads, any county taxes, any county commissioners, any county courts of probate, any county record office, any county organization. All these things have been managed in Rhode Island by the towns, or, when incorporated as cities, by the cities. There are no county officers, except the clerk of the Supreme Court and of the Court of Common Pleas "within and for" each county, who has the charge of these courts when they meet in the respective counties; the sheriff, whose writ runs throughout the state; and the keeper of the county jail (who, in other than Providence County, is the sheriff of the county). All these are state officers, being elected by the general assembly and paid by the state. The political machine has not yet thought of providing that these state officers shall be paid out of the money of the towns, while they shall not be under the control of the voters of the towns whose money shall thus pay them. Why should state police officers stand on any different footing?

Let us now examine some of the leading cases upon this subject.

The People *v.* Draper:[1] In this case it was held that the reservation contained in Sec. 2, Art. X. of the constitution of New York of 1846, to the electors or local authorities of the right to elect or appoint county, city, town, and village officers, relates only to such offices as existed when the constitution went into effect, and therefore that the legislature may create new civil divisions of the state embracing two or more existing counties, cities,

[1] 15 N. Y. 532 (1857).

towns, or villages, providing the old civil divisions be not abolished. Consequently the act to establish a Metropolitan Police District, consisting of the counties of New York, Kings, Richmond, and Westchester, was upheld as constitutional. Each county was to pay its proportion of the expense of the police force into the state treasury, whence it was to be disbursed, with the use of the police property of New York and Brooklyn, by the new board, without compensation, but without change of ownership. The preëxisting system of police was abolished, together with the control over the police by the former authorities of the towns, cities, etc., of the new district. It does not seem to have been objected that, although the state had the power to appoint, control, and pay a state constabulary or police, it had no power to use the property of the old towns, cities, etc., for that purpose without compensation, although the opinion admits (p. 540) that, if the provisions of the statute had been limited territorially to the city of New York, it would have been in conflict with the section of the constitution cited.

The opinion states in effect, even if only indirectly (p. 556), that the police of New York is inefficient, that crime is rampant, and the arm of criminal law is paralyzed, although there was no allegation of any statement of this kind in the pleadings, the case being heard on demurrer to the answer. The opinion can only be sustained upon the assumption that a court may take judicial cognizance of such a state of things.

Admitting the power of the state legislature in case of necessity to create a system of state police for the repression of crime, following the precedent of the Act 10 Geo. IV. c. 44, creating a metropolitan police for London and its vicinity, a state act of this character should leave intact and untouched the local police of the towns and cities within the area of the new district. For the act cited, 10 Geo. IV. c. 44, was passed by Parliament, which, "with its powers of legislation unrestrained by written limitations, so far respected the immemorial municipal rights of the city of London, and the inherent love which the English people entertain for local administration, that it left the municipal police force of the city in existence and entirely untouched by the act."[1]

The plain statement of the facts connected with this case by Professor Goodnow (p. 20), in his Municipal Home Rule, shows

[1] People *v.* Draper, pp. 570, 571, by Brown, J., in his dissenting opinion, the whole of which should be carefully read, especially as his conclusions have been adopted since then, as we shall see, by the New York Court of Appeals.

that the historical antecedents of New York are such as to warrant the conclusion that the case was wrongly decided, apart from the error made by the court in going outside of what was admitted by the demurrer.

"The city of New York received from the English kings during the colonial period a charter, which, on the declaration of the independence of the colony of New York and the establishment of the new state of New York, was confirmed by the first constitution of the state (Art. XXXVI.). For a considerable period after the adoption of this constitution, changes in that charter were made upon the initiation of the people of the city, which initiation took place through the medium of charter conventions, whose members were elected by the people of the city, and no statute which was passed by the legislature of the state, relative to the affairs of the city of New York, took effect within the city until it had been approved by the city. About the middle of the century, the legislature was called upon to interfere in the administration by the city of certain matters which affected the state as a whole. One of the most marked examples of this central interference, made without the consent or approval of the city or its people, is to be found in the adoption of the metropolitan police bill in 1857. The administration of the police in the period immediately preceding 1857 had been accompanied by great scandal, and was regarded as extremely inefficient. Partly because of this, and partly, it is believed, for reasons of partisan politics, the legislature provided for the formation of a metropolitan police district which embraced all the territory of certain outlying districts. On account of the unprecedented character of such an act, the people of New York, led by the mayor, attempted to resist the enforcement of the bill, and such resistance led to positive bloodshed. The question, however, was finally referred to the courts, and the Court of Appeals (People *v.* Draper, 15 N. Y. 532) held that the action of the legislature was perfectly proper, inasmuch as the administration of the police was not a local function, but was a matter which affected the state as a whole, and might therefore be put into the hands of authorities having jurisdiction over a territory greater than that of any one city, and appointed by the central government of the state. The success of the legislature in thus interfering in what had been considered by the people of New York a branch of municipal administration led it to carry its interference into other branches where its action could not be so well justified. In addition to centralizing in the same way the administration of the fire department and the administration of the public health and of excise legislation, *i. e.*, liquor legislation, the legislature provided for a commission to attend to the public parks, which were evidently a matter of purely local concern. It has, within recent years, appointed an aqueduct and a rapid transit commission, both bodies attending not to state but to muni-

cipal business. The application of the principle thus established has been of great disadvantage to the government of the various cities within the state, and, as has been pointed out by the Hon. Seth Low in his chapter on Municipal Government in Bryce's American Commonwealth, 1st Am. ed., vol. i. p. 639, 'the habit of interference in city action has become to the legislature almost a second nature.'"

The case of The People *v.* Draper was followed by The People *v.* Shepard,[1] which involved the constitutionality of an act establishing a Capital Police District, embracing parts of Albany and Rensselaer counties, the city of Schenectady, and the lines of railroad between Albany and Schenectady.

Emboldened by success, the politicians next sought to extend the field of their peculiar operations by passing an act "to establish the Rensselaer Police District," to consist of the city of Troy and a contiguous strip, the principle supposed to have been established in The People *v.* Draper being relied upon as giving color to this act.[2]

The satirical statement in the opinion, last paragraph, page 67, shows that the court well understood the nature of the forces securing such legislation: "As the Capital Police District was an experiment, and, as it resulted, a successful experiment, upon the principles supposed to be established in People *v.* Draper, the act before us is an experiment, and in the direction of an encroachment upon the constitution, an improvement upon both acts, and marks the progressive spirit of the day."

Cooley also well understood the nature of these forces: —

"A remarkable case of evasion to avoid the purpose of the Constitution, and still keep within its terms, was considered in People *v.* Albertson, 55 N. Y. 50."[3]

The case of People *v.* Draper is criticised, distinguished, and regretted at pp. 63, 64, 65 of People *v.* Albertson; and the case of People *v.* Shepard is questioned at pp. 65, 66, 67, with strong approval given to Brown, J.'s, dissenting opinion in People *v.* Shepard, at page 64: —

"That decision has now stood so long judicially uncondemned, although never, I think, satisfactory to the public or the legal profession, that it might not be proper, under any circumstances, to review or overrule it; and it is to be hoped, in the interests of constitutional government

[1] 36 N. Y. 285 (1867). [2] The People *v.* Albertson, 55 N. Y. 50 (1873).
[3] Cooley, Const. Lims. 207, note 1.

by the people, that the occasion to reaffirm its doctrines may never arise. To my mind, the dissenting opinion of Judge Brown, concurred in by Judge Comstock, presents unanswerable arguments why the decision should have been different."

That the cases of People *v.* Draper and People *v.* Shepard are considered as overruled at the present time in New York, sufficiently appears in Rathbone *v.* Wirth:[1] —

"But neither the Draper nor Shepard case, I think, can any longer be considered authority in this state, since the decision of the case of People *v.* Albertson."[2]

Upon appeal to the Court of Appeals, the judgment in the Supreme Court was affirmed.[3] The opinions given in both courts all deserve careful study. The result is that the doctrine laid down in People *v.* Draper has been successfully shaken, and is no longer the law in New York. It is no longer an authority.

It may be claimed that this is largely in consequence of Sec. 2, Art. X. of the constitution of New York, 1846, reënacted in the constitution adopted November 6, 1894, in force January 1, 1895. But it is submitted that this section is merely declaratory of what the law would be as to the powers of cities, towns, and villages to elect their own officers, even without this statement in the constitution, and therefore has no bearing on the matter at issue.

Town of Duanesburg *v.* Jenkins:[4] At page 189 in the opinion of the Commissioners of Appeals, by Johnson, C., will be found the statement: "A town is, as to the powers it shall possess and the functions it shall perform, the creature of the legislative will." But this statement is a mere *obiter dictum*, as it was not the issue then before the court. The case related to the validity of an act of the legislature declaring that where town railroad bonds have been issued by a town commissioner, and the railroad shall have been constructed through such town, the bonds shall be binding upon the town, without reference to the sufficiency of the proof that the town had duly authorized the issue of bonds. Clearly the town would be estopped from denying their obligation after standing by, allowing the railroad to be built, and reaping the benefits therefrom. The case is of no weight as an authority that the legislature has complete powers over towns, because no such broad principle was necessary to the decision of the case.

---

[1] 40 N. Y. Supp. 535 (1896), at pp. 545 and 546; 6 App. Div. N. Y. 277, s. c.
[2] 55 N. Y. 50, by Herrick J. [3] 150 N. Y. 459 (1896). [4] 57 N. Y. 117 (1874).

The Mayor, etc. *v.* The State, etc.: [1] It was held in this case that, the power of appointment to offices having been exercised by the legislature from the earliest period of the government, in the absence of any prohibition, express or implied, in the constitution, it is presumed the intention was that the legislature should continue to exercise that power, and therfore it could appoint the officers, the validity of whose appointment was in issue in this case.

Similarly, in those states where towns and cities managed their own local affairs and elected their own officers before there was a written constitution, in the absence of any prohibition, express or implied, in the constitution, it is to be presumed the intention of the people framing the constitution was that the towns and cities should continue to exercise the same powers. To this extent, therefore, this case supports the principles herein contended for.

That no *test* for election or appointment to office is allowable, see the same case, declaring unconstitutional a proviso "that no Black Republican, or endorser or approver of the Helper book," shall be appointed to office. We shall take up this subject later on.

In Pumphrey *v.* Mayor, etc.,[2] of Baltimore, the question as stated in the opinion (page 151) was whether the legislature had power to direct and require the city to take and maintain a certain bridge. This was a question similar to that raised in State *v.* Williams,[3] already considered. It may well be that the legislature has power to order highways and bridges to be built, and to apportion the cost thereof upon municipalities or other territorial divisions of the state already existing or created for that purpose, even although towns and cities may have a right to local self-government. The opinion says, with correctness (page 152): "Now if there were no bridge at that place, it would certainly be competent for the legislature to require the city to construct one; then what valid objection can there be to an act requiring the city to purchase one which is already constructed?"

Here the decision might have rested, and we should have no fault to find with it. But it also states that public corporations are created for political purposes; that they are instruments of the government subject to the control of the legislature, "and the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises."

As a universal statement of American law, or even probably of

[1] 15 Md. 376 (1859). [2] 47 Md. 145 (1877). [3] 68 Conn. 131.

the law in Maryland, we deny the correctness of such language; as to the case in which these sweeping statements were made, they were *obiter dicta.*

State *v.* County Court of St. Louis:[1] An act of the legislature authorized the Board of Police Commissioners of the city of St. Louis, whenever they shall need money to meet the expense of the police force, to make requisition upon the county of St. Louis for one fourth and upon the city of St. Louis for three fourths thereof. The act was resisted, upon the ground that to compel the county without its consent to contribute towards the support of the city police is in violation of common right and of the constitution of the state, in that it appropriates private property without just compensation; that it is retroactive in its operation; and that it violates the principles of taxation as laid down in the constitution. No objection was made upon the ground that the act is in violation of the right of towns and cities to local self-government nor was the subject alluded to in the opinion sustaining the validity of the act. The case is therefore not to the point. Whether towns and cities in Missouri have a right to local self-government would require an examination of its local history and political development which we cannot here enter into. Nor was such an examination gone into in this case.

Booth *v.* Town of Woodbury:[2] The real question in this case was whether a town has the power to appropriate money for gratuities to men drafted into the military service of the United States. The court decided that the towns of this state had not the power. and to this decision we bow. But to go further, as the court did, and to say that towns, like other corporations, can exercise no powers except such as are expressly granted to them, or such as are necessary to enable them to carry out the powers expressly granted to discharge their duties, is only *obiter dictum*, for this broad question was not before the court. So in the next case, Webster *v.* Town of Harwinton.[3]

The question was whether the towns of this state have power to appropriate money for bounties to be paid to men drafted into the military service of the United States, the same question that was raised in the last case.

The court decided they have no such power. It was unnecessary and therefore *obiter dictum* to go further, as the court did, and to say that the towns of Connecticut have no original power of

[1] 34 Mo. 546 (1864). [2] 32 Conn. 138 (1864). [3] Ib. 131 (1864).

legislation and taxation. This conclusion could only be got at after a thorough presentation of both sides of this question in a case in which it would be the real issue, and an examination of the documents, customs, laws, and the historical development of the state would be indispensable, and this was not done. The opinion loses greatly in force because of its unnecessary wholesale unjudicial condemnation and depreciation of the citation as authority of the work of historians and of their deductions (page 136), and the assertion that the views expressed by them are made without sufficient reflection or examination. This sweeping *obiter dictum* is made too merely as bald assertion, without bringing forward one single instance of incorrectness by the historians condemned, or any proof of the correctness of the position thus arrived at by the court. At page 137 the learned judge, delivering the opinion of the court, says: "But the inhabitants of the several plantations and towns obviously could not and did not constitute themselves corporations," . . . thus deciding as a question of law and of fact (or as a mixed question of law and fact) something which an examination shows was exactly what the towns did do. It is submitted, therefore, that not only was this declaration by the court *obiter dictum;* it was also incorrect. This finding by the court implies also that what the towns did do was not enough to constitute them corporations; whereas no argument was made as to what is necessary to make the inhabitants of a town a corporation.

State *v.* Williams: [1] We need not disagree with the main doctrine in this case, that the state can impose upon such territorial subdivision of the state as it may deem equitable the burden of constructing and maintaining highways and bridges as it may judge best for the public interests.

But on page 149 the opinion of the court by Baldwin, J., states: "Towns have no inherent rights: they have always been the mere creatures of the colony or state, with such functions and such only as were conceded or recognized by law," citing Webster *v.* Town of Harwinton, the case last considered, thus furnishing an illustration of the conversion of an *obiter dictum* into a recognized authority in a subsequent case. Yet the extract above cited is itself only *obiter dictum*, for towns may have inherent rights and yet the power of the state to create new territorial subdivisions of the state for certain purposes may not conflict or interfere with those town rights which are to be exercised within their own

[1] 68 Conn. 131 (1896).

proper sphere only. As to the relation of towns to the state in Connecticut, it is submitted that no impartial inquirer can doubt what they are after reading the careful summary of the historical development thereof in the dissenting opinion of Andrews, C. J., in this case, pp. 157–177, Hamersly, J., concurring.

This case was carried to the Supreme Court of the United States, and will be found reported as Williams *v.* Eggleston,[1] It is sometimes but incorrectly cited as an authority to the effect that towns have no powers unless they are expressly or by necessary implication conferred upon them. What this court really decided was that there was nothing in this case that violated any of the provisions of the Constitution of the United States.

The statements in the opinion by Brewer, J., p. 310, "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of government, and as such it is subject to the control of the legislature," is *obiter dictum*, unless the statement be construed to mean that the United States has no supervisory power in the premises. This would seem to be what is meant by the additional statement: "These are matters of a purely local nature, in respect to which the federal Constitution does not limit the power of the states."

Amasa M. Eaton.

[To be continued.]

[1] 170 U. S. 304 (1897).